

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1757

Cir. Ct. No. 2016CV3236

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF SHOREWOOD HILLS,

PLAINTIFF-APPELLANT,

V.

SIVACHANDRAN SWAMINATHAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JOSANN M. REYNOLDS, Judge. *Reversed and cause remanded with directions.*

¶1 FITZPATRICK, J.¹ The Village of Shorewood Hills appeals from an order of the Dane County Circuit Court denying its motion for a new trial.²

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² I will refer to the Plaintiff-Appellant, the Village of Shorewood Hills, as “the Village” except where the context or the facts require a different approach.

Based on Sivachandran Swaminathan's failure to file a response brief and his abandonment of this appeal, I summarily reverse the order of the circuit court and remand for further proceedings consistent with this opinion. *See* WIS. STAT. Rule 809.83(2).

BACKGROUND

¶2 In June 2016, Swaminathan was charged, following a traffic stop, with operating a motor vehicle while under the influence of an intoxicant, operating with a prohibited alcohol concentration, operating without required lamp lights, operating without proof of insurance, and for non-registration of an automobile. After a municipal court trial, Swaminathan was found guilty of the PAC charge and the traffic violations. Swaminathan appealed his conviction to the circuit court. During the circuit court trial, Swaminathan objected to the admission of the defendant's breathalyzer test results. Defense counsel argued that the accuracy-check test results, and the Village's already-admitted maintenance tests of the instrument, did not comply with the manufacturer's certification requirements for the appropriate gas concentration of the instrument.

¶3 The circuit court sustained the objection, concluding that the test was inadmissible "without some expert to explain" the discrepancy alleged by defense counsel. As a result, the operating a vehicle with a prohibited alcohol concentration charge was dismissed. The Village moved for a new trial, arguing that the defendant's objection was based on "factually false premises" and the circuit court erred as a matter of law. The circuit court denied the motion, and the Village appealed.

¶4 Initially during this appeal, all notices issued by this court to Swaminathan were returned to the court by the United States Postal Service

marked as “Not deliverable as addressed – Unable to forward,” and Swaminathan did not submit a response brief within the requisite time period. This court received correspondence from Swaminathan’s trial counsel explaining that he was not representing Swaminathan during the appeal, and trial counsel supplied an updated mailing address for Swaminathan. This court subsequently extended the response brief deadline by thirty days and sent relevant correspondence to Swaminathan’s updated address. In a subsequent order clarifying the extension, this court warned Swaminathan that “if the respondent’s brief is not filed and good cause not shown for extension by March 30, 2018, we may summarily reverse the judgment or order appealed.” The two orders from this court sent to Swaminathan’s updated mailing address were not returned to this court by the United States Postal Service. Swaminathan never filed a response brief.

DISCUSSION

¶5 This court “may summarily reverse a judgment or order if the respondent fails to file a brief, and we usually do. Failure to file a respondent’s brief tacitly concedes that the trial court erred.” *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993) (quoting *State v. R.R.R.*, 166 Wis. 2d 306, 311, 479 N.W.2d 237 (Ct. App. 1991)); *see also* WIS. STAT. RULE 809.83(2).

¶6 An example of this court’s authority to summarily reverse a circuit court’s decision is exemplified in the *Blackdeer* case, which involved a summary reversal as a sanction for failure to file a response brief. The *Blackdeer* court made various requests for a brief from the respondent, but a brief was never filed. *Blackdeer*, 176 Wis. 2d at 257-58. Therefore, this court deemed the respondent’s arguments to be abandoned and summarily reversed the circuit court’s decision.

Id. Here, although all indications are that Swaminathan has received this court's two most recent orders, Swaminathan has not responded to this court's orders for a response brief, including an extended deadline to submit the brief. Because this court has not received any brief from Swaminathan, I deem his arguments and the appeal to be abandoned by Swaminathan. *See In re the Marriage of Raz v. Brown*, 2003 WI 29, ¶32, 260 Wis. 2d 614, 660 N.W.2d 647.

¶7 Moreover, by Swaminathan's abandonment of this appeal, it would place me in the position of his advocate if I take up the merits of the Village's appeal, and a judge of this court may not act as an advocate for a litigant. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. It is not up to me to provide arguments for parties but, rather, to decide the case on the arguments presented by the parties. *Id.* Given the facts and legal authority presented to this court in the appellant's brief, it appears that the Village's arguments may have merit under Wisconsin law. *See City of New Berlin v. Wertz*, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981); WIS. ADMIN. CODE TRANS § 311.10. However, because I decide this issue on procedural grounds, I do not reach the merits of the issue.

¶8 The Village requests that the matter be remanded to the circuit court with directions that judgment be entered in its favor. That request is denied. There is no completely satisfactory solution in this situation, but I conclude that the appropriate result is to remand for a new trial. First, if Swaminathan does not appear at trial, then a default can be granted against him. Second, another reason to remand for a new trial is contained in the *Wertz* case relied on by the Village, which held that the question of the accuracy of the equipment at issue goes to the weight accorded to the test and not its admissibility. *Wertz*, 105 Wis. 2d at 675,

n.6. Because a finder of fact has not yet determined the weight which should be given to the test, a new trial is appropriate.

CONCLUSION

¶9 For the foregoing reasons, the decision of the circuit court is summarily reversed and the cause is remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

